IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 22892 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?No

2 To be referred to the Reporter or not ?No

3 Whether their Lordships wish to see the fair copy of the judgment ?No

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?No

5 Whether it is to be circulated to the civil judge ?No

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THE NEW INDIA ASSURANCE COMPANY LTD., - Petitioner(s)
Versus
THE PEC LIMITED AND OTHERS & 1 - Respondent(s)

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Appearance :
MR PV NANAVATI for Petitioner(s) : 1,MR VIBHUTI NANAVATI for Petitioner(s) : 1,
MR ABHISHEK M MEHTA for Respondent(s) : 1,
MR KAMAL TRIVEDI with MR KJ THAKAR for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date :01/12/2006

CAV JUDGMENT

1. New India Assurance Company Limited, the

petitioner, original defendant has filed this petition under Article 227 of the Constitution of India praying for issuance of writ of certiorari for challenging the judgment and order dated 22nd September, 2006, passed by the learned Chamber Judge, City Civil Court, Ahmedabad in Summary Suit No.2813 of 2004 below Summons for Judgment Exhibit 12. The learned trial Judge by his impugned order held that leave to defend be granted to the defendants in Summary Suits No.2812 of 2004 and 2813 of 2004 on condition to deposit 50% of the said amount in both the suits within four weeks from today. On depositing the amount thus suits to be transferred to allow the long cause suit.

2. The basic facts of Civil Suit No.2813 of 2004 are as under:-

2.1 PEC Limited, a Government of India undertaking – plaintiff No.1 and Adani Exports Ltd., plaintiff No.2 (hereinafter referred to as

the plaintiffs) had filed a civil suit being Civil Suit No.2813 of 2004 under Order 37 of the Code of Civil Procedure (for short C.P.C.) for the liquidated demand of Rs.5,49,65,104/- and interest on the same from the date of the suit over the same. All these amounts have been claimed for loss of goods at Porbandar, Kandla and Mundra Ports being principal amount and interest on the said amounts from 5.6.2003 to 20.10.2004 from the date of notice till filing of the suit and further interest on the said amount till realisation in favour of the plaintiff i.e. Principal amount Rs.4,40,40,618/-.

3. The plaintiff has produced voluminous evidence on record and filed a separate paper book which is to be called as Paper Book No.2 of this matter because, as far as Civil Suit No.2812 of 2004 is concerned, the paper book was filed and here the separate paper book is also filed because some of the documents are different.

4. Plaintiff No.1 appointed/authorised plaintiff No.2 as its agent by virtue of agreements dated 29.3.2001 and 30.3.2001 for execution of contracts entered into by plaintiff No.1 with its foreign buyers for export of Indian wheat in bulk. The defendant has issued an open marine insurance policy in respect of 1,00,000 MT of wheat for Rs.51,26,00,000/- (Rupees Fifty One Crore Twenty Six Lacs only) (see para 32-36 of paper book).

4.1 It has been contended by the plaintiffs that the plaintiff has paid total premium of Rs.6,26,386/- for the said insured sum. The period of the said marine insurance policy was from 16.4.2001 to 15.4.2002. The agreed value of the policy was concluded at the rate of Rs.5126 per MT.

4.2 The plaintiffs submitted that certain amendments were made in the policy for increasing and extending the storage period in view of

letters addressed by plaintiffs dated 8.5.2001, 14.6.2001 and 6.8.2001 in view of the extension granted without demur and by charging additional premiums. The defendant issued open marine policy to protect the assured i.e. the original plaintiffs against losses.

4.3 The plaintiffs submitted that the cargo of Indian wheat was to be exported and for that purpose it was stored at the Ports of Okha, Bhavnagar, Kandla and Mundra. The plaintiffs had addressed letters dated 21.5.2001, 29.6.2001, 31.7.2001 and 3.8.2001 and made declarations in respect of the shipments of the goods (see page 15 to 17 of the paper book). While the process of export was going on, the wheat stored at the aforesaid Ports got damaged due to cyclonic rains which occurred in May/June 2001.

4.4 In view of the aforesaid cyclone, the plaintiffs addressed letters dated 7.6.2001 and 14.7.2001 to the defendant about the damage

caused to the goods.

4.5 The defendant appointed M/s.Metcalfe & Hodgkinson Pvt. Ltd. as Surveyor for Okha Port. The defendant also appointed M/s.J.B.Boda Surveyors Pvt.Ltd., Ahmedabad as Surveyor for Bhavnagar Port. The defendant had also appointed M/s.J.B.Boda Surveyors Pvt.Ltd., Gandhidham as Surveyor for Kandla Port and also appointed M/s.G.P.Dave & Sons as Surveyor for Mundra Port. M/s.Metcalfe & Hodgkinson Pvt. Ltd., has filed its report on 1.1.2002 (Page 214). M/s.J.B.Boda Surveyors Pvt.Ltd., filed its report on January 9, 2002, in connection with Bhavnagar Port (Page 284). M/s.J.B.Boda Surveyor also filed survey report on 14th September, 2001, for Kandla Port (Page 22). M/s.J.B.Boda Surveyors, Gandhidham filed its report on 7/9th January, 2002, for Mundra Port (Page 117). The plaintiffs had carried out the work of segregating the damaged and semi-damaged/undamaged wheat under the supervision of the surveyor. The surveyor had

also discussed the measures for minimising the loss.

4.6 The plaintiffs had taken all steps, including the steps to faithfully carry out the instructions of the surveyors to the best of their satisfaction for minimising the loss. After completing the procedure, the surveyors appointed by Insurance Company submitted their survey reports (page 214 for Okha Port, page 284 for Bhavnagar Port, page 22 for Kandla Port and page 117 for Mundra Port).

4.6A The plaintiffs thereafter by letters dated 25.2.2002, 22.2.2002, 21.1.2002 and 21.1.2002 had lodged their claims before the defendant under and as per the above referred open marine insurance policy. The total claim in respect of the damage caused to the goods at the aforesaid ports was to the tune of Rs.4,40,40,618/- (being Rs.59,16,552/- for Okha Port, Rs.7,06,881/- for Bhavnagar Port,

Rs.3,39,30,916/- for Kandla Port and Rs.34,86,269/- (modified from earlier figure of Rs.43,04,252 for Mundra Port).

4.7 It is the contention of the plaintiffs that despite the claims submitted by them in respect of the damage caused to the goods at the aforesaid four ports due to cyclonic rains and in spite of the fact that the surveyors appointed by the insurance company itself had submitted their respective reports about the extent/quantum of damage, the defendant did not pay the claim/insurance amounts in this behalf.

4.8 The defendant informed the plaintiffs by letter dated 8.11.2001 informing the plaintiff No.2 that M/s.Trans Ocean Marine and General Survey Agencies and M/s.J.Basheer & Associates Surveyors Pvt. Ltd., were appointed for finalisation of the claim.

4.9 The petitioner submitted that by the time

the second surveyor was appointed somewhere in November, 2001, the scene after the cyclonic rains had totally changed inasmuch as it was almost 5 to 6 months since the cyclonic rains damaged the goods and the surveyors appointed by the defendant had already completed the survey and submitted their reports and the damaged, semi-damaged and undamaged goods were almost disposed of which was in the knowledge of the defendant and the surveyors appointed by it.

4.10 In spite of the aforesaid position, the plaintiff was shocked and surprised that the second team of surveyors appears to have undertaken the work of so-called survey assessment at the back and without the knowledge of the plaintiffs and merely on the basis of the paper work of the first team of surveyors. It appears that the second surveyor working as if sitting in appeal over the survey work of the first team of surveyors and the said second team is claimed to have submitted some reports

allegedly assessing the damage at back of and without knowledge of plaintiffs. According to which, quantification of the total damage to the goods at the said ports came to about Rs.2,64,30,983/- as against the amount of Rs.4,40,40,618/- assessed by the team of surveyors initially appointed by the defendant.

4.11 It is the case of the plaintiffs that all these exercise were done unauthorisedly and at the back of the plaintiffs and more particularly after inordinate delay and total change in circumstances as well as fact situation. Since the defendant did not pay the claim of the plaintiffs and instead by its four separate letters dated 21.7.2003 denied their claims, therefore they were constrained to file Summary Suit No.2813 of 2004 along with Summons for Judgment in the City Civil Court, Ahmedabad for the liquidated demand of Rs.4,40,40,618/- being the claim amount arising from the aforesaid open marine insurance policy read with the survey

reports of the team of surveyors initially appointed by the defendant itself and amount of Rs.1,09,24,486/- being the interest at the rate of 18% calculated for the period from 5.6.2003 to 20.10.2004 totalling to Rs.5,49,65,104/- (Rupees Five Crore Forty Nine Lacs Sixty Five Thousand One Hundred & Four Only).

4.12 In the said suit the plaintiffs have taken out Judges Summons and the defendant filed application seeking leave to defend along with affidavit in support of the application wherein the defendant did not dispute the factum of cyclone in the last week of May 2001 and first week of June 2001 which affected the aforesaid four ports and the goods stored therein.

4.13 In the said suit, the plaintiffs have produced voluminous documents i.e. Paper book containing pages 1 to 456 wherein paper book containing insurance policy, survey reports by the team of surveyors initially appointed by the

defendant, intimations given by the plaintiffs to the defendant insurance company about the damage caused to the goods and the documents about the basis of loss assessed. This has been called as Second Paper Book.

4.14 Thereafter the matter was heard by the learned trial Judge. As indicated above, the learned trial Judge passed a detailed and reasoned order giving cogent and convincing reason in his judgment and order dated 22nd September, 2006, below Exh.12 which is common order passed in Summary Suits No.2812 of 2004 and 2813 of 2004 and passed the order as indicated earlier imposing certain conditions.

4.15 Civil Summary Suit No.2812 of is filed by State Trading Corporation of India Ltd. and plaintiff No.2, whereas Civil Summary Suit No.2813 of 2004 is filed by PEC Ltd., with plaintiff No.2. By the said order dated 22.9.2006, the learned trial Judge has granted

leave to defend by directing the defendant to deposit 50% of the suit amount.

4.16 Being aggrieved and dissatisfied with the said order, the present petition has been filed before this Court.

5. It may be noted that Summary Suit No.2812 of 2004 was filed wherein the plaintiffs were State Trading Corporation Ltd., and Adani Export Limited who have filed the suit against the defendant-insurance company. The facts of Summary Suit No.2812 of 2004 and present suit i.e. Summary Suit No.2813 of 2004 filed by PEC Limited – plaintiff No.1 and Adani Export Ltd., plaintiff No.2 against the defendant-insurance company. The facts so far goods were stored and therefore damaged due to cyclone are common facts in both the suits. However, for the purpose of quantum of liquidated demand, the figures differs and therefore I have set out this facts of Summary Suit No.2813 of 2004 in the present Writ

Petition No.22892 of 2006. However, the legal contentions which have been starts from para 3.1 in the said matter wherein I have set out the facts of petitioner's contention in para 4, the contention of Mr.Mihir Thakore from para 5 onwards, rejoinder of Mr.Nanavati against Mr.Mihir Thakor sur-rejoinder, then Court observations and findings from para 8 onwards are all common and therefore I do not repeat the same and for the reasons given in that judgment i.e. Special Civil Application No.22891 of 2006, the present petition is also required to be dismissed.

6. In view of these discussions, following conclusion is recorded by this Court as under:-

(i) In view of Order 37 Rule 2 of the CPC and in view of the Delhi High Court judgment in the case of Rajinder Kumar Khanna Vs. The Oriental Insurance Co. and another (supra), the

present suit filed by the plaintiffs for liquidated demand is maintainable.

(ii) In view of Order 37 Rule 2 of the CPC and in view of the judgment of this Court in the case of Ficom Organics Limited (supra), the present suit filed for principal amount plus interest is also maintainable at law.

(iii) As regards contention of defendant regarding appointment of second surveyor, for the reasons stated by this Court, the defence of the defendant is not a bona fide defence and defence raised by the defendant does not raises a real issue and defence raised by the defendant is not a plausible defence on the facts stated by the defendant in this behalf. The Court is not satisfied that defendant has a good defence to the claim on its merits. The defence

raised by the defendant does not raises any triable issue.

7. In the facts and circumstances of the case, when the trial Court imposed the conditions, the said conditions are based on material facts set out in the case and the learned trial Judge has exercised discretion on sound judicial principle. In view of the same, this Court do not intend to interfere with the discretionary order of the learned trial Judge based on sound principle after appreciating all the facts and circumstances of the case by imposing condition of depositing 50% of the suit amount particularly in view of Division Bench judgment of this Court in Dalwadi case (supra), and coupled with the fact that two decisions of the Hon'ble Supreme Court where under Article 227 of the Constitution, the Hon'ble Supreme Court held that the High Court should not interfere with the discretionary jurisdiction in this behalf.

8. In view of the discussions made

hereinabove, the petition is required to be dismissed. Hence this petition is dismissed. Rule is discharged with no order as to costs.

9. This Court is extremely grateful to Mr.Vibhuti Nanavati, learned advocate appeared on behalf of the petitioner, Mr.Mihir Thakore, learned Senior Counsel with Mr.Amar Bhatt, learned advocate appeared on behalf of the respondents-original plaintiffs and Mr.Kamal B.Trivedi, learned Senior Advocate and learned Advocate General with Mr.K.J.Thakar, learned advocate who has appeared before this Court and very ably assisted this Court so that this Court can decide the matter.

(K.M. MEHTA, J.)

After pronouncement of the judgment, Shri P.V.Nanavati, learned advocate for the petitioner prays that the order passed by the trial Court dated 22.9.2006 by which the Court has granted leave to defend to defendants in Summary Suit

Nos.2813 of 2004 on condition to deposit 50% of the suit amount in both the suits within four weeks from the date of passing the order and further directed that on depositing the amount, suits be transferred to long cause suits. The said order dated 22.9.2006 passed by the learned trial court has been extended from time to time till today. However, in view of the pronouncement of judgment, Shri Nanavati prays that this Court may stay the order of the trial court dated 22.9.2006 for further six weeks as defendant desires to assail the judgment of this Court before the Hon'ble Supreme Court of India. To this prayer, Mr.Thakar, learned advocate who appeared on behalf of the original plaintiffs has strongly objected to it. This Court is of the view that when any party desires to approach the Hon'ble Apex Court, in the interest of justice, this Court may grant some time so that the parties can challenge the matter before the higher forum. In view of the same, stay as prayed for is extended upto 19th January, 2007.

(K.M. MEHTA, J.)

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